United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-6006

To be argued by
THOMAS HOFFMAN

B

P/S

In The

United States Court of Appeals

For The Second Circuit

R. L. BLACK, ADA SMITH, JAMES BURKS, BEATRICE BURKS, SHANNON BAIRD, SHARON BAIRD, ALVIN BLACK, MARSHA BLACK, FURMAN G. RENTZ, MIGNONNE RENTZ, VINCENT SANFORD, ETHELINE SANFORD, LEE E. SIMIEN, LESLIE SMALL, SOLLA SMALL, ROY T. BLACK, GERTRUDE BLACK, NATHANIEL MONTGOMERY, TOMMIE MONTGOMERY, J. V. BLACK, GENNIE BLACK, on behalf of themselves and on behalf of all others similarly situated,

Appellants,

vs.

UNITED STATES OF AMERICA, WILLIAM E. SIMON, Secretary of the Treasury, DONALD ALEXANDER, Commissioner, Internal Revenue Service, CHARLES BRENNAN, District Director, Internal Revenue Service, Brooklyn District, and other unknown agents of the Internal Revenue Service,

Appellees.

Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLANTS

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IN THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

NO. 75-6006

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APPELLEES.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

QUESTIONS PRESENTED

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE GOVERNMENTAL OFFICIALS NAMED IN THE APPELLANTS' COMPLAINT ENJOYED AN ABSOLUTE PRIVILEGE AND IMMUNITY FROM SUITS FOR CIVIL DAMAGES WITHOUT FIRST CONDUCTING A HEARING TO DETERMINE THEIR RESPECTIVE INVOLVEMENT WITH THE STATUTORY AND CONSTITUTIONAL MISCONDUCT ABOUT WHICH APPELLANTS COMPLAIN?

WHETHER, IN THE CIRCUMSTANCES OF THIS CASE, THE DISTRICT COURT ERRED IN HOLDING THAT THE ANTI INJUNCTION ACT, 26 U.S.C. §7421(a), DEPRIVED THE COURT OF SUBJECT MATTER JURISDICTION TO ENJOIN THE STATUTORY AND CONSTITUTIONAL MISCONDUCT AIMED SOLELY AT DESTROYING THE BUSINESS OF THE APPELLANT, R.L. BLACK?

WHETHER THE DISTRICT COURT'S FINDING THAT THE COMPLAINT STATED NO CLAIM OF PRESENT DAMAGE IS CLEARLY ERRONEOUS?

OPINION BELOW

THE MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT BY THE HONORABLE EDWARD R. NEAHER IS REPORTED IN 388 F.SUPP. 805 (E.D. 1975).

STATEMENT OF CASE

This appeal arises from the denial of appellants' motion for a preliminary injunction, F.R.Civ.P. 65, and the dismissal of appellants' original and amended complaints for lack of jurisdiction over the appellees or over the subject matter of the action, F.R.Civ.P. 12 (b) (2) and (1), and for failure to state a claim upon which relief can be granted, F.R.Civ.P. 12 (b)(6).

Appellants in this alleged class action are R.L. Black (hereinafter referred to as "Black"), the sole proprietor of an income tax preparation service, and a number of his clients suing on behalf of themselves and all others similarly situated. Appellees include the United States, the Secretary of the Treasury, the Commissioner of the Internal Revenue Service (hereinafter referred to as "IRS"), the District Director of IRS in Brooklyn, New York, Elonia Spruill, an employee of the IRS in Brooklyn, and "other unknown agents" of the IRS. Various forms of declaratory, injunctive and monetary relief are sought against the appellees, essentially on the claim that they are conducting an investigation of Black and of his clients' tax returns and liability in a manner violative of his and their constitutional and statutory rights and with the intent of driving Black out of business as a tax preparer. The court's

jurisdiction was invoked under 28 U.S.C. §§1331, 1340, 1343(4), 1346, 2201 and 2202, 2671, et seq., and 42 U.S.C. §1981.

There being no answer or answering affidavit on behalf of appellees, the facts appearing in the complaint, amended complaint and affidavits of appellants supporting their motion for a preliminary injunction must be taken as true for purposes of this appeal.

Black has been engaged in the income tax preparation business since 1971 and presently has some 560 clients. In a letter dated June 26, 1974, the IRS informed Black that a number of tax returns prepared by him for clients for tax years 1972 and 1973 were under a special joint investigation with the IRS Intelligence Division. By a subsequent letter dated August 28, 1974, Black was further informed that the IRS had "under consideration a recommendation that criminal proceedings be instituted against you on account of such returns." Black is a black citizen and virtually all of his clients are black, a substantial number being people of low income. He contends that the appellees have engaged in racially discriminatory conduct in their investigation.

In pursuing their investigation of Black, IRS agents have made repeated visits to the homes of appellant clients and to their places of employment. Some 85 clients have been interrogated about their dealings with Black, have been informed that he is under criminal investigation and have been warned that they would be called in for audits unless they cooperated

in furnishing information. Clients ha. been told that their refund checks would be withheld pending completion of the investigation, including some who submitted short form returns claiming only standard deductions. More than 120 clients have had their refund checks wi*hheld. More recently, almost 200 of the clients have received notice that all deductions claimed by them on their respective returns have been denied. Summonses have been issued to clients calling for records pertaining to the tax liabi'ity of Black or for documents already in the possession of the IRS and have been made returnable in less than the ten (10) days provided by statute. Other clients have been informed that unless they came to the IRS office voluntarily to discuss the investigation of Black, they would receive summonses, and be audited.

In requesting injunctive relief, Black asserts that he does not seek to halt any legitimate investigation of his business. His complaint is directed to the alleged intimidating tactics of IRS agents in summoning and interrogating his clients, repeatedly visiting them at their places of business and homes, illegally using the civil statutory remedies for collection of taxes in conducting a criminal investigation, threatening clients with civil summonses and audits, telling them that Black is under criminal investigation and that any refunds due them will be withheld pending completion of the investigation. This, he contends, is a calculated plan to cause his clients to cease

patronizing him and drive him out of the tax return preparation business in violation of the due process clause of the Fifth Amendment to the United States Constitution and of the Internal Revenue Code and regulations.

In their amended complaint, appellants assert that the investigation of R.L. Black and the R.L. Black Income Tax Service was initiated by Elonia Spruill, the mother of R.L. Black's former wife. Ms. Spruill, an employee of the Internal Revenue Service, had supervision over the income tax file of appellant Black. Appellants submit that the harrassment of Mr. Black's clients under the guise of an investigation of the R.L. Black Income Tax Service was - at least in part - triggerred by Ms. Spruill's desire to retaliate against Black for the acrimony resulting from the dissolution of his marriage with her daughter. Appellants contend that the initiation of a criminal investigation in an effort to destroy Mr. Black's business simply to satisfy her own personal desires for revenge constitutes and abuse of her powers as an employee of the IRS.

The appellees did not answer nor challenge the allegations of statutory and constitutional misconduct raised by the appellants' motion for preliminary injunction and appellants original and amended complaints. Instead, the appellees filed a motion to deny the motion for preliminary injunction and to dismiss the original and amended complaints for lack of jurisdiction over the appellees or over the subject matter of the action, F.R.

Civ. P. 12(b)(2) and (1), and for failure to state a claim upon which relief could be granted, F.R.Civ. P. 12(b)(6).

In granting the appellees' motion to dismiss, the district court based its decision on two grounds: 1. that the action sought by the appellants fell within the proscriptions of the Anti-Injunction Act, 28 U.S.C. §7421(a), barring suits seeking to enjoin the collection and assessment of taxes and 2. that the governmental officials named in the appellants' complaint enjoyed an absolute privilege and immunity from suits for civil damages being filed against them which arise out of the performance of their duties.

While recognizing that the appellants could bring a cause of action for damages against the "unknown agents" of the IRS if they could prove that the agents acted in bad faith and deprived the appellants of rights guaranteed them by the Fifth Amendment to the United States Constitution and the laws of the United States, Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau, 403 U.S. 388 (1971); States Marine Lines, Inc. v. Shultz, 498 F. 2d 1146, 1157 (4th Cir. 1974), the District Court found that the complaints stated no claim of present damages.

ARGUMENT

1. THE DISTRICT COURT ERRED IN HOLDING THAT THE GOVERNMENTAL OFFICIALS NAMED IN THE APPELLANTS' COMPLAINT ENJOYED AN ABSOLUTE PRIVILEGE AND IMMUNITY FROM SUITS FOR CIVIL DAMAGES WITHOUT FIRST CONDUCTING A HEARING TO DETERMINE THEIR INVOLVEMENT WITH THE STATUTORY AND CONSTITUTIONAL MISCONDUCT ABOUT WHICH APPELLANTS COMPLAIN

In Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974), the personal representatives of the estates of three students who had been killed during an alleged civil disorder at Kent State University sought damages against the Governnor, the Adjutant General, and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the president of Kent State University. The Court of Appeals affirmed the District Court's dismissal of the complaint for lack of jurisdiction over the subject matter on the theory that the common-law doctrine of executive immunity barred action against these officials. The Supreme Court reversed and struck down the notion that governmental officials enjoy an absolute privilege and immunity from suits for civil damages. Chief Justice Burger, delivering the opinion of the Court, outlined the relevant test:

> "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive

> branch of government, the variation being dependent upon the scope of the discretion and the responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S. at 247-248.

Like the case in Scheuer, supra, the present case, in the documents before the District Court specifically placed in issue whether the named governmental officials were acting within the scope of their duties under the United States Constitution, the Internal Revenue Code and the Federal Tax Regulations; whether they acted within the range of discretion permitted the holders of such office and whether they acted in good faith both in initiating and conducting their alleged investigation of the appellant's business.

Yet, without conducting a hearing to determine the merits of appellants' claims, the District Court concluded sua sponte that "the named officials are being sued only because they are in charge of an executive department and agency of the government on whose behalf the unknown IRS agents are performing the acts about which complaint is made." No evidence in the record thus far suggests such a conclusion. Appellants are entitled to offer evidence to support their claims unless "it appears beyond doubt that the plaintiff can prove no set of facts in

support of his claim, which would entitle him to relief." Conley v. Gibbson, 255 U.S. 41, 45-46 (1957). See also Gardner v. Toilet Goods Assn.,387 U.S. 167 (1967).

As the Court stated in Scheuer v. Rhodes, supra at 40 L.Ed 2d 96:

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."

The Court's conclusion in Scheuer v. Rhodes, supra, is likewise applicable to the present case.

> "Further proceedings, either by way of summary judgment or by a trial on the merits is required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint." 466 U.S. at 250.

Though Scheuer involved an examination of the qualified immunity doctrine in 42 U.S.C. §1983 actions against state officials, no significant reason exists for adopting a different qualified immunity doctrine for actions against federal officers alleging violation of constitutional rights under 28 U.S.C. §1331. In fact, several courts of appeals have held that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in 42 U.S.C. §1983 suits. See Apton

v. Wilson, 506 F. 2d 83, 92-93 (D.C. Cir. 1974) (specifically applying Scheuer in suit brought under Fourth and Fifth Amendments to United States Constitution); Rowley v. McMillan, 502 F. 2d 1326, 1335 (4th Cir. 1974) (specifically applying Scheuer to suits brought under the First and Fourth Amendments to United States Constitution); States Marine Lines, Inc. v. Shultz, supra, (specifically applying Scheuer to suit brought under Fifth Amendment to United States Constitution);Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra.

More recently the Ninth Circuit Court of Appeals has applied the Scheuer rationale in cases quite similar to the instant case. Mark v. Groff, Babic and Ryan, 521 F. 2d 1376 (10th Cir. 1975). See also, Pelayo v. Rosenberg and Schmidt, _____ F. 2d _____ (10th Cir. 1975).

In Mark v. Groff, Babic and Ryan, supra, as in the present case, the plaintiff-appellant was a tax accountant who brought a civil action seeking damages, claiming that the IRS agents (defendants-appellees) named in the complaint maliciously, intentionally and wantonly took certain actions to ruin his tax return preparation business and to cause him extreme anguish and emotional distress in violation of his constitutional rights under the Fifth, Sixth and Eighth Amendments to the United States Constitution. When the District Court dismissed the complaint on the ground that the IRS agents

were immune from damage suits, the Court of Appeals following Scheuer, reversed and remanded the case for further proceedings to determine the scope of immunity for such officials.

Indeed the District Court recognized that the appellant would have a cause of action against the "unknown agents" of the IRS if it could be proven that the agents acted in bad faith and caused him damage by depriving him of rights guaranteed by the Fifth Amendment to the United States Constitution and the laws of the United States. Though the scope of immunity enjoyed by the other governmental officials named in the complaint would vary with "the scope of discretion and responsibilities of the office," Scheuer teaches that no governmental official enjoys an absolute immunity from civil damage actions. In Pelayo, supra, for example, the Ninth Circuit specifically applied its holding in Mark to the district directors of the Immigration and Naturalization Service as well as the Internal Revenue Service.

Similarly, the appellants here are entitled to a hearing at which they may have the opportunity to present evidence to substantiate their claims against those governmental officials named in their complaint and to determine to what extent, if any, such officials should be held liable for the statutory and constitutional misconduct alleged in their complaint.

II. THE DISTRICT COURT ERRED IN HOLDING THAT IN THE CIRCUMSTANCES OF THIS CASE THE ANTI-INJUNCTION ACT, 26 U.S.C. §7421(a), DEPRIVED THE COURT OF SUBJECT MATTER JURISDICTION TO ENJOIN STATUTORY AND CONSTITUTIONAL MISCONDUCT BY AGENTS, EMPLOYEES AND OFFICIALS OF THE INTERNAL REVENUE SERVICE AIMED SOLELY AT DESTROYING THE BUSINESS OF THE APPELLANT, R.L. BLACK

The Anti-Injunction Act, 26 U.S.C. §7421(a) provides in pertinent part that:

> ...no suit for the purpose of restraining the assessment or collection of any tax by any person, whether or not such person is the person against whom such tax is assessed.

Appellants allege that the procedures pursuant to Title 26, §7602, 7603, 7604 and 7605 were utilized in a criminal investigation of appellant Black; clearly these provisions cannot be used in conducting a criminal investigation. U.S. v. Couch, 449 F. 2d 141, aff'd. 93 S.Ct. 611, 409 U.S. 322, 34 L.Ed. 2d 548 (1971). The complaint alleged, with supporting affidavits, that the summonses which were issued to the clients of appellant Black were initiated by the Intelligence Division of the IRS, which Division has jurisdiction to conduct only criminal investigations. Federal Tax Regulations, Section 601.107(a); U.S. v. Dickerson, 413 F. 2d 1111 (7th Cir. 1969).

Even if the investigation was not criminal in nature, the courts have expressed their disapproval of the use of sum-

monses by the IRS in investigating a third party, particularly when the IRS is investigating a professional service. In U.S. v. Theodore, 479 F. 2d 749 (4th Cir. 1973), the court stated:

> "... where it appears that the purpose of the summons is 'a rambling exploration' of a third party's files, it will not be enforced . . . Section 7602 summons are not meant to serve as a tool to police the accounting profession." (emphasis added) at 754. See also U.S. v. Theodore, supra, U.S. v. Harrington, 388 F. 2d 520 (2d Cir. 1968); U.S. v. Dauphin Deposit Trust Co., 385 F. 2d 129 (3rd Cir. 1967); U.S. v. Williams, 337 F. Supp. 1114 (S.D.N.Y. 1971) and U.S. v. Humble Refining Co., 488 F. 2d 953 (5th Cir. 1974) (where the court held that summonses could not be used by the IRS to enlist the aid of citizens in its data-gathering projects.)

Concededly the IRS has investigative powers; however, these powers are not without limit and cannot be abused. U.S. v. Powell, 379 U.S. 48 at 58; U.S. v. Harrington, 388 F. 2d 520 (2d Cir. 1968). Judge Lumbard in U.S. v. Harrington, supra, stated that the investigative powers cannot be abused in random disregard of the personal interests involved, particularly where third parties are involved. The burden which such investigation of Mr. Black's income tax business would impose upon third parties; i.e., Mr. Black's clients, must be weighed and considered. See U.S. v. Williams, 337 F. Supp. 1114 (S.D. N.Y., 1971) (where court recognized the displeasure a psychologist's patients would feel at the disclosure of the fact of their treatment and government questioning about the

extent and cause of their visits.) However, the pattern of conduct followed by the IRS in investigating Mr. Black's income tax service is graver than in Williams, supra, since the automatic withholding of their refunds would create an obvious dissuasion of present and future clients' utilization of Mr. Black's services.

However, it is further submitted that the investigation was not civil but rather was criminal in nature and the use of civil statutory remedies in determining tax liability, such as the issuance of summonses and audits, are illegal in a criminal investigation. Furthermore, the Anti-Injunction Statute whose purpose is to insure that the IRS is not deterred in its collection and determination of civil tax liability has no applicability to wrongful misuse of the IRS in conducting a criminal investigation. Such illegal and unconstitutional activity should be and can be enjoined. Green v. Connally, 330 F. Supp. 1150 (D.C. 1971); DeMasters v. Arend, 313 F. 2d 79 (9th Cir. 1963). The Supreme Court decisions relied upon by the District Court are inappropriate.

In Bob Jones University v. Simon, 416 U.S. 725, 94 S.Ct. 2038, 2046, 40 L.Ed. 2d 496 (1974), the Supreme Court stated:

> "The Court has interpreted the principal purpose of this language to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, 'and to require that the legal right to the disputed funds be determined in suit for a refund.' Enochs v. Williams Packing and Navigation Co., 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed. 2d 292 (1962).

Thus understood, §7421(a) ensures that the assessment and collection of taxes follows the procedure prescribed by the Internal Revenue Code. Objections, even on constitutional grounds, are to be determined in a suit for refund. See, e.g., Dodge v. Osborne, 240 U.S. 118, 36 S.Ct. 275, 60 L.Ed. 557 (1916); Bailey v. George, 259 U.S. 16, 42 S.Ct. 419, 66 L. Ed. 816 (1922).

The district court concluded that §7421(a) deprived it of subject matter jurisdiction since:

> "The injunctive or declaratory relief sought by plaintiffs here falls squarely within the literal prohibitions of the statute. Regardless of the motivation of the IRS agents who are conducting the investigation, the interviewing of taxpayers regarding their returns, the issuance of summonses, the requiring of audits and the withholding of refunds are all matters related to the assessment and collection of taxes. (App. p.)

Appellants submit that this is too broad a reading of even the Anti-Injunction Act which is to be interpreted broadly to effectuate its purposes. While "the interviewing of taxpayers regarding their returns, the issuance of summonses, the

requiring of audits and the withholding of refunds" are activities typically and most frequently associated with the collection and assessment of taxes, such is not always the case. The implicit irrebuttable presumption that such activities are always and necessarily related to the assessment and collection of taxes contained in the District Court's holding goes too far.

Specifically, the appellants complain that these activities have not been related to the assessment or collection of any tax, but rather have been aimed solely at destroying the tax preparation business of R.L. Black. The appellees do not deny these charges.

It is one thing if a person's business happens to be destroyed as a collateral result of a lawful investigation by the Internal Revenue Service, but it is quite a different matter where the Internal Revenue Service engages in statutory and constitutional misconduct under the guise of an investigation solely for the purpose of destroying a person's business with no relation to the collection and assessment of taxes.

The appellants do not seek to restrain the collection or assessment of any tax. They do not contest the amount of their taxes, nor do they seek to limit, in any way, the amount of tax revenue collectible by the United States. They do not seek to restrain any lawful investigation conducted by the IRS of Mr. Black's business or of the tax liabilities of his clients.

Rather, the appellants here seek only to restrain the statutory and constitutional misconduct of agents, employees and officials of the IRS - motivated by racial prejudice or domestic acrimony - aimed solely at destroying Mr. Black's business. Accordingly, the activities which the appellants seek to enjoin fall squarely outside the prohibitions of the Anti-Injunction Act. The preferred course of being able to raise their complaints in a suit for refund is not available.

Courts have recognized the appropriateness of injunctive relief against the Secretary of Treasury and the Internal Revenue Service when they have acted in violation of the Constitution or of federal statutes. Eastern Kentucky Welfare Rights Organization v. Shultz, 370 F. Supp. 325 (D. C. D. C. 1973) reversed on other grounds 506 F. 2d 1278 (Ct. of Appeals D. C. 1974) (Anti-Injunction Statute held not applicable in a suit attempting to enjoin and declare invalid a revenue ruling allowing private non-profit hospital to qualify as charitable institutions under the Internal Revenue Code without requiring them to admit and provide free or reduced rate service to persons unable to pay); McGlotten v. Connally, 338 F. Supp. 448 (D. C. D. C. 1972), (Three judge court declaring tax advantages granted to a fraternal order; which denied membership to non-whites, to be unconstitutional and restraining the Secretary of Treasury from granting such); National Milk Producers v. Shultz, 372 F. Supp. 745 (D. C. D. C. 1974) (ordering Secretary of Treasury to comply with the requirements of a tariff statute. This practice has

been unanimously upheld by the United States Supreme Court. Green v. Connally, supra.; Coit v. Green, 404 U.S. 997, 92 S. Ct. 564, 30 L. Ed. 2d 550 (1971) (injunction granted against Secretary of Treasurer and Commissioner of the IRS restraining them from approving any application for a tax exempt status for any private school in Mississippi engaging in racial discrimination).

Accordingly, the appellants respectfully request this Court to enjoin the continuing statutory and constitutional misconduct of the agents, employees and officials of the Internal Revenue Service not related to the collection or assessment of any tax but rather aimed solely at destroying Mr. Black's business and the use of the civil statutes in the collection and assessment of taxes for a criminal investigation.

III. THE DISTRICT COURT'S FINDING THAT THE COMPLAINT STATED NO CLAIM OF PRESENT DAMAGE IS CLEARLY ERRONEOUS

In dismissing a complaint for failure to state a claim upon which relief can be granted, it is well-settled that the complaint is to be read in the light most favorable to the appellants. Pleadings are to be liberally construed so as to do substantial justice. Rule 8, Federal Rules of Civil Procedure; Beacon Theaters, Inc. v. Westover, 359 U.S. 5-0, 79 S.Ct. 948, 3 L.Ed. 2d 988 (1959).

The action was brought by Mr. Black and 21 other named appellants who were clients of the R.L. Black Income Tax Service. Paragraph 19 of the Complaint (App. 6) states:

> "That plaintiffs and their class have been unduly harrassed, investigated and examined by defendants and their agents and employees with regard to their federal income tax returns filed over the years 1971 through 1973. Various plaintiffs and members of their class have been subjected to various illegal and/or unconstitutional acts by defendants and their agents and employees, said acts including but not being limited to: ..."

Furthermore, as to appellant R.L. Black, it is stated in Paragraph 38 of the Complaint (App. P. 12):

> "That all of the aforementioned acts are wanton, malicious, tortious and defamatory and are committed with the intent to drive plaintiff R. L. Black out of business by intimidating plaintiff R.L. Black and his clients. Plaintiff R.L. Black's business and reputation has incurred irreparable injury as a result of

> the acts of defendants and their employees and agents." (Emphasis added.)

Finally, the demand for relief requests compensation for present damages both to Appellant R.L. Black and to the other named appellants and their class.

> "Award plaintiff R.L. Black damages in the amount of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000) as compensation for the malicious and tortious acts of defendants and their agents in injuring the business and reputation of plaintiff R.L. Black.
>
> 4. Award plaintiffs and their class damages in the amount of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000) as compensation for the injuries suffered due to the defendants and their agents and employees' illegal and unconstitutional acts."

As can be seen from the above, even the most cursory examination of the Complaint demonstrates several claims of present damages.

CONCLUSION

For the foregoing reasons, appellants respectfully pray that the decision of the Court below be reversed; and that the cause be remanded to the District Court with direction.

Respectfully submitted,

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In the United States Court of Appeals
For the Second Circuit

----------x

R. L. Black, et al.

Appellants,

-against-

UNITED STATES OF AMERICA, et al.

Appellees.

----------x

AFFIDAVIT OF SERVICE

No. 75-6006

County of New York)
:
State of New York)

THOMAS HOFFMAN, the attorney for Appellant, being duly sworn deposes and says that on the 8th day of December, 1975, I did serve a copy of the Appellants' Appendix in the above-styled matter, upon the attorney for the Appellant by mailing three (3) copies of same, first class, postage prepaid to him as follows: Scott P. Crampton, Assistant Attorney General Tax Division, United States Department of Justice, Washington, D. C. 20530.

Dated: New York, New York
December 8, 1975

Thomas Hoffman
Attorney for Appellant
200 West 57th Street
New York, New York 10019
(212) 581-1180

Sworn to before me on

this 8th day of December, 1975.

NORMAN LISS
Notary Public, State of New York
No. 03-12378625
Qualified in Bronx County
Commission Expires March 30, 1977